

Message Text

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PAGE 01 LUSAKA 01212 280714Z

43

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FOR EXIM

EO 11652: N/A

TAGS: EFIN

SUBJECT: EXIM LENDING POLICY

1. IN REGARD TO THREE SEPARATE UNRELATED EXIM CREDITS AND HAVING FUTURE CREDIT IMPLCATIONS FOR ZAMBIA, MINISTRY OF PLANNING AND FINANCE PERM SECY MWANANSHIKU ON JUNE 24 AND 25 (A) REOPENED QUESTION OF GRZ GUARANTEES, (B) RAISED ISSUE OF EXIM GUARANTEE OF COMMERCIAL PORTION OF CREDITS, AND (C) REEMPHASIZED DEEP GRZ CONCERN ABOUT EXIM REQUIREMENTS FOR ADVANCE COMMITMENT TO WAIVE RIGHT TO PLEA SOVEREIGN IMMUNITY IN EVENT OF SUIT.

2. GRZ GUARANTEE UNDER CREDIT NO. 5737 (NCCM). DESPITE EARLIER MWANANSHIKU AND MINISTER CHIKWANDA ASSURANCES GRZ PREPARED GUARANTEE \$8.3 MILLION EXIM PORTION OF CREDIT NO. 5737, POLICY REVIEW HAS LED TO DECISION GRZ SHOULD NOT GUARANTEE "SMALL SUMS" FOR SUCH ENTERPRISES AS MINING COMPANIES WHOSE CASH FLOWS AND SIZE ASSURE THEIR CREDIT-WORTHINESS. IF REQUIRED, GRZ PREPARED GUARANTEE LOANS TO MINES IN EXCESS OF \$50 MILLION. IN SUCH CASES AS CREDIT NO. 5894 FOR ZAMBIA RAILWAYS LOCOMOTIVIES, GRZ ACCEPTS NEED FOR GOVT GUARANTEE SINCE COMPANY OPERATES AT LOSS AND SURVIVES ONLY BY VIRTUE OF GOVT SUBSIDIES. READING BETWEEN LINES OF LONG MWANANSHIKU EXPLANATION, ESSENTIAL PROBLEM

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PAGE 02 LUSAKA 01212 280714Z

SEEMS BE THAT GOVT VERY ANXIOUS AVOID VIGOROUS BACK-BENCH

ATTACKS ON GOVT GUARANTEES OF CLEARLY CREDIT-WORTHY ENTERPRISES SUCH AS IT EXPERIENCED LAST TIME GUARANTEE AUTHORITY WAS SOUGHT IN NATIONAL ASSEMBLY.

3. EXIM GUARANTEE OF COMMERCIAL, I.E., CHEMICAL BANK, PORTION OF CREDIT FOR PURCHASE OF ONE NEW BOEING 737 AND ONE USED BOEING 707 (STATE 149965). GRZ DELGITHED EXIM PREPARED FINACE 45 PERCENT OF THIS TRANSACTION. IN ABSENCE EXIM GUARANTEE OF CHEMICAL BANK 45 PERCENT SHARE OF TRANSACTION, HOWEVER, CHEMICAL NOW PROPOSING COMMERCIAL PORTION OF LOAN BE SYNDICATED, TO WHICH GRZ OBJECTS. MWANANSHIKU URGENTLY REQUESTS EXIM TO RECONSIDER AND AGREE TO GUARANTEE COMMERCIAL PORTION OF LOAN.

4. WAIVER OF SOVEREIGN IMMUNITY UNDER ARTICLE III (A) (6) OF CREDIT NO. 5894 FOR LOCOMOTIVES. (NOTE: FOLLOWING DISCUSSION ALSO APPLIES TO ANY OTHER EXIM CREDIT AGREEMENTS INCORPORATING THIS PROVISION.) THIS ISSUE FIRST RAISED JUNE 9 BY ACTING PERM SECY WALUSHIKU (LUSAKA 1053). MWANANSHIKU DWELT AT LENGTH ON STRONG GRZ AVERSION TO IT. HE ARGUED CAPACITY TO REPAY IN NO WAY RELATED TO WAIVER OF SOVEREIGN IMMUNITY; NO SUCH WAIVER WAS GIVEN FOR RECENTLY CONCLUDED \$100 MILLION CONSORTIUM LOAN TO NCCM: SUCH WAIVER FOR \$8.3 MILLION WOULD BE POLITICALLY INDEFENSIBLE; IF EXIM REQUIRES FIRMER ASSURANCES, GRZ WOULD BE RECEPTIVE TO ALTERNATIVE OF EXIM SURVEY TEAM AND RECOMMENDATIONS RE COUNTRY PRFORMANCE ON IMF/IBRD MODEL. IN END, MWANANSHIKU ACKNOWLEDGED PROBLEM IS BASICALLY PSYCHOLOGICAL AND POLITICAL: TO NEW EMERGENT NATIONS, CONCEPT OF WAIVING SOVEREIGN IMMUNITY, ESPECIALLY IN ADVANCE OF PURELY HYPOTHETICAL SUIT, EXTREMELY DISTATEFUL IF NOT WHOLLY UNPALATABLE. IF WAIVER NONETHELESS REQUIRED, HE ASSERTED IT LIKELY ZAMBIA WILL NOT BE ABLE AGREE TO LOAN.

5. UNDERSTAND SOVEREIGN IMMUNITY ISSUE WAS MAJOR BONE OF CONTENTION IN NEGOTIATION OF RECENT CITI BANK-LED \$100 MILLION CONSORTIUM LOAN TO NCCM. AS OF POSSIBLE UTILITY TO EXIM CONSIDERATION OF PROBLEM, WE HAVE ACQUIRED IN CONFIDENCE FOLLOWING PERTINENT COMPROMISE TEXTS ULTIMATELY AGREED TO BY PARTIES TO NCCM CONSORTIUM LOAN:

(A) CLAUSE 24 OF MAIN AGREEMENT: "LAW. THIS AGREEMENT SHALL LIMITED OFFICIAL USE

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PAGE 03 LUSAKA 01212 280714Z

BE GOVERNED BY AND CONSTRUED AND GIVEN EFFECT TO IN ALL RESPECTS IN ACCORDANCE WITH THE LAWS OF ENGLAND. THE BORROWER HEREBY CONSENTS TO ANY LEGAL ACTION OF PROCEEDING WITH RESPECT TO THIS AGREEMENT BEING BROUGHT IN ZAMBIA OR IN ENGLAND OR IN THE STATE OF NEW YORK, HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF THE COURTS OF ENGLAND, AND HEREBY IRREVOCABLY DESIGNATES MEMACO SERVICES LIMITED OF 2 SOUTH SQUARE, LONDON WC1R 5HR AS ITS AUTORIZED AGENT FOR THE SERVICE OF PROCESS IN

COURTS OF ENGLAND."

(B) CLAUSE 13 OF GRZ GUARANTEE: "THIS GUARANTEE SHALL BE GOVERNED BY AND CONSTRUED AND GIVEN EFFECT TO IN ALL RESPECTS IN ACCORDANCE WITH THE LAWS OF ENGLAND. THE GUARANTOR HEREBY CONSENTS TO ANY LEGAL ACTION OR PROCEEDING WITH RESPECT TO THIS GUARANTEE BEING BROUGHT IN ZAMBIA, OR IN ENGLAND OR IN THE STATE OF NEW YORK."

6. REQUEST ANSWERS TO FOLLOWING QUESTIONS:

(A) ARE THERE ANY CIRCUMSTANCES IN WHICH GRZ MAY BE EXCUSED FROM GUARANTEEING EXIM PORTION OF CREDITS? ANSWER SHOULD HAVE SPECIFIC REFERENCE TO CREDIT NO. 5737 (PARA 2 ABOVE) AND IN GENERAL TO OTHER PENDING AND POTENTIAL LOANS.

(B) WITH SPECIFIC REFERENCE TO USED BOEING 707 AND 737 AIRCRAFT TRANSACTION (PARA 3 ABOVE) BUT ALSO AS MATTER OF GENERAL POLICY, ARE THERE CONDITIONS UNDER WHICH EXIM WOULD BE PREPARED TO GUARANTEE COMMERCIAL PORTION OF EXIM CREDITS? WE NOTE IN THIS REGARD EXIM HAS NOW AGREED TO GUARANTEE 50 PERCENT OF COMMERCIAL PORTION OF CREDIT NO. 5737 TO NCCM (STATE 149154).

(C) WITH SPECIFIC REFERENCE TO AGREEMENT ON CREDIT NO. 5894 (PARA 4 ABOVE) BUT ALSO AS GENERAL RULE, ARE THERE CONDITIONS UNDER WHICH SOVEREIGN IMMUNITY WAIVER CLAUSE CAN BE DELETED? IF NOT, CAN ALTERNATIVE LANGUAGE AVOIDING OBJECTIONABLE TERMINOLOGY BUT SERVING SAME PURPOSE BE SUBSTITUTED? IF SO, WOULD APPRECIATE TEXT OF SUCH SUBSTITUTE. (WE HAVE NOT SUBMITTED FOR ZAMBIAN CONSIDERATION ALTERNATE TEXT TRANSMITTED BY STATE 141822. TEXT AS RECEIVED WAS INCOMPLETE AND IN ANY EVENT BELIEVE ANY TEXT SPECIFICALLY STATING "SOVEREIGN IMMUNITY" OR "IMMUNITY" LIMITED OFFICIAL USE

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PAGE 04 LUSAKA 01212 280714Z

IS WAIVED WILL PROVE UNACCEPTABLE TO ZAMBIANS.)

(D) IN EVENT OF NEGATIVE REPLY TO ANY OR ALL OF FOREGOING, NEED FULL EXPLANATION OF REASONS FOR PASSING TO GRZ.

(E) FINALLY, IF ANSWERS TO ABOVE QUESTIONS ARE NEGATIVE, CAN WE STATE CATEGORICALLY TO ZAMBIANS THAT EXACT SAME REQUIREMENTS APPLY TO ALL REPEAT ALL OTHER BORROWERS WITHOUT EXCEPTION? THIS ESPECIALLY IMPORTANT IN THE CASE OF THE SOVEREIGN IMMUNITY WAIVER CLAUSE.

7. RE PARA 3 OF STATE 141822, CONTENTS THIS MESSAGE, WITH EXCEPTION OF TEXTS FROM NCCM CONSORTIUM LOAN AGREEMENT (PARA 5 ABOVE), MAY BE DISCUSSED WITH PRIVATE LENDERS

CONCERNED ON NEED TO KNOW BASIS.

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Disposition Authority: RowellE0
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Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
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